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IN THE

Supreme Court of the United States

No. 706

October Term, 1968

WILLIAMS AND COMPANY, INC.,
Appellant,

v.

THE CITY OF PITTSBURGH and DAVID A. SMITH, Treasurer, and SCHOOL DISTRICT OF PITTSBURGH and DAVID A. SMITH, Treasurer.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS. 38 AND 39 MARCH TERM, 1968.

JURISDICTIONAL STATEMENT AND APPENDICES

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INDEX.

	PAGE
Jurisdictional Statement	1
I. Reports of Opinions of Lower Courts	1
II. Grounds upon which Jurisdiction is Invoked	1
III. Questions Presented by the Appeal	5
IV. Statement of the Case	6
V. The Federal Questions are Substantial	9
VI. Matters Appended	11
Appendices:	
A—Petition to Reopen Hearing	12
B—Memorandum and Order	17
C—Answer to Petition for Writ of Certiorari Under Rule 68½	21
D—Opinion	28
E—Petition for Reargument	33
F—Answer to Petition for Reargument	38

TABLE OF CITATIONS.

TABLE OF CASES.

Allied Stores of Ohio v. Bowers, 358 U. S. 522, 526, 79 S. Ct. 437, 3 L. Ed. 480, 484 (1959)	10
Cramp v. Board of Public Instruction of Orange County, Florida, 368 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961)	2
Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295 (1917)	3
Federal Trade Commission v. Borden Company, 383 U. S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153 (1966)	10
Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964)	10

PAGE

Irvin v. Dowd, 359 U. S. 394, 404, 79 S. Ct. 825, 3 L. Ed. 2d 900, 907 (1959) 9
Musser v. State of Utah, 333 U. S. 95, 68 S. Ct. 397, 92 L. Ed. 592 (1948) 2
Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 151, 75 S. Ct. 607, 99 L. Ed. 950, 959 (1955) 10
State of Alaska v. Arctic Maid, 366 U. S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961) 9
Supreme Lodge v. Meyer, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885 (1924) 3
United States v. Borden Company, 370 U. S. 460, 82 S. Ct. 1309, 8 L. Ed. 2d 627 (1962) 10
In the Matter of Whittington, 391 U. S. 341, 88 S. Ct. 1507, 20 L. Ed. 2d 625 (1968) 9
Williams v. Georgia, 349 U. S. 375, 383, 75 S. Ct. 814, 99 L. Ed. 1161, 1170 (1955) 9
Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948) 2

TABLE OF STATUTES.

Act of June 20, 1947, P. L. 745, as amended, 24 P. S. §§ 582.1 *et seq.* 2, 3, 4
Act of June 25, 1947, P. L. 1145, as amended, 53 P. S. §§ 6851 *et seq.* 2, 4, 5
62 Stat. 929, 28 U. S. C. A. § 1257 (2) 2

IN THE

Supreme Court of the United States

No. .....

October Term, 1968

WILLIAMS AND COMPANY, INC.,

Appellant,

v.

THE CITY OF PITTSBURGH and DAVID A. SMITH, Treasurer, and SCHOOL DISTRICT OF PITTSBURGH and DAVID A. SMITH, Treasurer.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS. 38 AND 39 MARCH TERM, 1968.

JURISDICTIONAL STATEMENT

I. Reports of Opinions of Lower Courts

The opinion of the Supreme Court of Pennsylvania is officially reported at 430 Pa. 509 (1968). It is unofficially reported at 244 A. 2d 37 (1968). The opinion of the County Court of Allegheny County is not reported anywhere either officially or unofficially. Copies of all relevant opinions are appended hereto.

II. Grounds Upon Which Jurisdiction is Invoked

This proceeding is an appeal to the court from a decision of the two taxing bodies, acting through their common trea-

surer, levying a mercantile tax upon the appellant taxpayer at the highest rate allowable. The School District of Pittsburgh proceedings were pursuant to the Act of June 20, 1947, P. L. 745, as amended, 24 P. S. §§ 582.1 *et seq.* The City of Pittsburgh proceeding was based upon the authority of the Act of June 25, 1947, P. L. 1145, as amended, 53 P. S. §§ 6851 *et seq.* The latter is known as the "Tax Anything Act."

The judgment or decree sought to be reviewed is the same as the opinion of the Pennsylvania Supreme Court. The opinion of the Supreme Court of Pennsylvania is dated, July 1, 1968. Thereafter, a timely Petition for Reargument was filed. Reargument was denied, without further opinion, on August 5, 1968, and the decision thereupon became final. Notice of Appeal was filed in the Supreme Court of Pennsylvania on October 24, 1968.

Jurisdiction is conferred upon the Supreme Court of the United States by 62 Stat. 929, 28 U. S. C. A. § 1257 (2) which authorizes appeals to the United States Court from State Supreme Court where the constitutionality of a state statute is challenged and the highest court of the State involved sustains the validity of the statute.

The cases believed to sustain the jurisdiction of the United States Supreme Court are, among others:

Cramp v. Board of Public Instruction of Orange County, Florida, 368 U. S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); and

Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948); and

Musser v. State of Utah, 333 U. S. 95, 68, S. Ct. 397, 92 L. Ed. 592 (1948); and

Supreme Lodge v. Meyer, 265 U. S. 30, 44 S. Ct. 432, 68 L. Ed. 885 (1924); and

Crew Levick Co. v. Commonwealth of Pennsylvania, 245 U. S. 292, 38 S. Ct. 126, 62 L. Ed. 295 (1917).

These cases establish a rule of law that the authoritative interpretation of a statute by a state Supreme Court establishes the final meaning of the statute on the point involved just as though the statute had been amended in a like manner by the legislature. This is precisely what is involved in the present appeal.

The statutes involved are quite simple. The provision of the law relating to the School District are as follows:

"§ 1 (3) 'Retail dealer' or 'Retail vendor' shall mean any person who is a dealer in, or vendor of, goods, wares and merchandise who is not a wholesale dealer or vendor." Act of June 20, 1947 P. L. 745, 746, 24 P. S. § 582.1(3).

"§ 1 (4) 'Dealer in, or vendor of, goods, wares and merchandise' shall not include any mechanic who keeps a store or warehouse at his place of manufactory or workshop in which he sells only his own manufactures, any person vending or disposing of articles of his own growth, produce, or manufacture, or any hawker or peddler licensed under any law of this Commonwealth." Act of June 20, P. L. 745, 746, 24 P. S. § 582.1(4).

"§ 3. Beginning in the year one thousand nine hundred forty-eight, and annually thereafter, every person deserving to continue to engage in . . . the business of wholesale or retail vendor of, or dealer in, goods, wares and merchandise, broker . . . shall on or before the first day of January of each license year, or prior to commencing business in any such license year, procure a merchantile license for his place of business, or if more than one, for each of his places of business in the school district from the receiver of school taxes or school treasurer . . . ." Act of June 20, P. L. 745, 747, 24 P. S. § 582.3.

"§ 4. Imposition and Rate of Tax. Every person engaging in any of the following occupations or businesses in any school district of the first class shall pay an annual mercantile license tax at the rate set forth:

". . .

"(3) Wholesale and retail vendors, or dealers in goods, wares and merchandise, at the rate of one-half (½) mill on each dollar of the volume of the annual gross wholesale business transacted by him, and one (1) mill on each dollar of the volume of the annual gross retail business transacted by him." Act of June 20, P. L. 745, 747-748, 24 P. S. § 582.4(3).

The provisions of the statutory law relating to the City are as follows:

"§ 1. A The duly constituted authorities of cities of second class . . . shall have the authority, by ordinance or resolution, for general revenue purposes, to levy, assess and collect or provide for the levying, assessment and collection of such taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivision, as it shall determine, except that such local authorities shall not have authority by virtue of this act to levy, assess and collect . . . (4) a tax on goods and articles manufactured in such political subdivision or the by-products of manufacture . . . or on any privilege, act or transaction related to the business of manufacturing, the production, preparation or processing of minerals, timber and natural resources, or farm products, by manufacturers, by producers and by farmers with respect to the goods, articles and products of their own manufacture, production or growth, or on any privilege, act or transaction relating to the business of processing by-products of manufacture, or the transportation, loading, unloading, or dumping or storage of such goods, articles, products or by-products . . . ." Act of June 25, 1947, P. L. 1145-1146, as amended by Act of May 9, 1949, P. L. 898, 899-900, 53 P. S. § 6851A.

"§ 1. E. No taxes levied under the provisions of this act shall be levied by any political subdivision on the

following subjects exceeding the rates specified in this subsection:

". . .

"(b) On each dollar of the whole volume of business transacted by wholesale dealers in goods, wares and merchandise, 1 mill; by retail dealers, in goods, wares and merchandise . . . 1½ mills; except in cities of second class, where rates shall not exceed 1 mill on wholesale dealers and 2 mills on retail dealers and proprietors." Act of June 25, 1947, P. L. 1145, as amended by Act of May 9, 1949, P. L. 898, 901, as amended by Act of May 27, 1953, P. L. 234, 236, 53 P. S. § 6851E.

III. Questions Presented by the Appeal

A. Are not state statutes, which authorize local taxing bodies to impose palpably disproportionate taxes on competitors in the same market area, violative of the Commerce Clause of the Constitution of the United States?

B. Are not state statutes, which authorize local taxing bodies to impose palpably disproportionate taxes on competitors in the same market area in such a manner as to interfere with the balance of competition therein, violative of Article 6, Clause 2 of the Constitution of the United States insofar as they disrupt the competitive balance established and preserved by the federal anti-trust laws?

C. Does not a taxpayer have a constitutional right to have constitutional questions, which are properly raised, heard by the courts in which those questions are raised?

IV. Statement of the Case

The appellant, Williams and Company, Inc., is a national distributor of certain metals and metal products such as nickel, stainless steel, copper, aluminum, brass, carbon steel products and steel tubing. It does business with manufacturers, fabricators, processors and repair and maintenance people among others. In connection with this business, the taxpayer engages in certain transactions which involve shipments directly from the supply mills. The customers place their orders with the taxpayer and the taxpayer then secures the items for the customers, placing the same order with the mill as the customer placed with Williams and Company, Inc. The mill sells to Williams and Company, Inc. f. o. b. cars point of origin and Williams and Company, Inc. sells to its customers on the same basis. The appellant also has extensive metal sales out of its warehouse as well.

The metals distribution industry is very competitive. In this market area, the appellant taxpayer has approximately thirteen competitors of consequence. These include United States Steel Corporation, Aluminum Company of America, International Nickel Company and Jones & Laughlin Steel Corporation, among others. A complete list may be found on page 98a of the printed record from the proceedings before the trial court which has been certified to this Court by the Supreme Court of Pennsylvania. Eleven of these companies with which the taxpayer must compete in the Pittsburgh market area are exempted from mercantile taxation because they manufacture their own products.

The appellant taxpayer, on the other hand, because of the decision of the Supreme Court of Pennsylvania, is taxed at the highest possible rate. The Pennsylvania Supreme

Court has decided that this is what the statutes involved mean and require.[1]

While the case was before the lower court, and after an initial hearing had been afforded the taxpayer, the taxpayer petitioned the court to reopen the hearing, the said petition being printed in the appendix to this Jurisdictional Statement beginning on page 12. In this petition, the first two constitutional questions were raised. After the hearing, the trial court (County Court of Allegheny County, Pennsylvania) wrote an opinion, part of which concerned the question of constitutionality. However, instead of answering the question raised, the Court simply decided the general question of the constitutionality of such statutes without making any reference to the authority cited from this Court. The "Memorandum and Order" of the trial court is printed in the appendix hereto beginning on page 17.

Since the taxing bodies lost one aspect of the case in the trial court, an appeal was taken to the Supreme Court of Pennsylvania. The appeal taken was discretionary with the Supreme Court of Pennsylvania, and the taxing bodies were required to file a Petition for Writ of Certiorari. In the taxpayer's Answer, the constitutional questions were raised again. This Answer is printed in the appendix hereto beginning on page 21. When the appeal was allowed and briefs were filed, the questions were again raised by the taxpayer in its printed brief as appellee. The briefs have been certified to this Court by the Supreme Court of Pennsylvania for this Court's

[1] It should be noted that while the case was before the Pennsylvania courts, the issues herein raised were presented in a slightly different manner. The Pennsylvania courts had not yet construed the statute within the framework of the present case. The taxpayer argued that, if the courts reached the conclusion the Pennsylvania Supreme Court ultimately did, the result would be unconstitutional for the reasons herein set forth.

examination. The Supreme Court of Pennsylvania, after oral argument (at which the taxpayer *again* raised the two constitutional questions) then reversed the lower court. The opinion is printed in the appendix hereto beginning at page 28. The Supreme Court of Pennsylvania decided that the classifications involved were reasonable (an issue not raised by the taxpayer), but, like the trial court, never at any time attempted to decide the issues that were squarely raised nor did it at any time discuss or even refer to the authority cited from this Court.

Thereafter followed a timely Petition for Reargument in which all of the foregoing was set forth. The questions were once again raised. This Petition for Reargument is printed in the appendix hereto beginning at page 33. In this petition, the third question was raised for the first time and the assertion was therein made that the taxpayer, under the circumstances of this case, had a constitutional right to have its constitutional questions decided. The Supreme Court of Pennsylvania denied the Petition for Reargument. Therefore, without ever facing the constitutional questions raised, the Supreme Court of Pennsylvania in effect ruled that the statute requires this taxpayer to pay a mercantile tax at its maximum rate while its competitors in the same market area are not taxed at all.

The record from the trial court demonstrates that such taxation affects the taxpayer's competitive position in that it reduces the number of sales personnel available, it reduces additional trucking service and it reduces advertising help. The taxpayer would be substantially more competitive in the market except for the imposition of the tax of which complaint is made (R. 81a-82a). The Supreme Court of Pennsylvania, as well as the trial court, refused to consider the matter.

V. The Federal Questions are Substantial.

It is contended that the federal questions are substantial. In this connection, the Court should do one of two things. It should either reverse and remand the case to the Pennsylvania Supreme Court for a consideration of the constitutional questions raised [*Cf. In the Matter of Whittington*, 391 U. S. 341, 88 S. Ct. 1507, 20 L. Ed. 2d 625 (1968)], or grant a plenary hearing.

There is no question but that the Pennsylvania Supreme Court had the obligation to decide the constitutional questions. Irvin v. Dowd, 359 U. S. 394, 404, 79 S. Ct. 825, 3 L. Ed. 2d 900, 907 (1959). And it is well established that where the constitutional questions are raised in the same manner as other questions in the case, the state Supreme Court may not decide the other questions adversely to the appellant and decline to entertain the constitutional claims. Williams v. Georgia, 349 U. S. 375, 383, 75 S. Ct. 814, 99 L. Ed. 1161, 1170 (1955).

There is no doubt that the constitutional question with regard to the violation of the Commerce Clause is a substantial one. For the basic question raised here was brought before this Court for a plenary hearing in *State of Alaska v. Arctic Maid*, 366 U. S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961). All of the members of this Court were in agreement on the basic constitutional proposition that a palpably disproportionate tax on competitors in the same market area was a violation of the United States Constitution. While this issue has continually been before the Pennsylvania courts, the doctrine of the *Arctic Maid* has at all times been ignored.

If this question was ignored, the issue raised under the Supremacy Clause was completely forgotten. It was never

alluded to by either of the Pennsylvania courts although it was raised to all states of the proceedings. But the states may not encroach upon "the prerogative of the National Government . . . ." Allied Stores of Ohio v. Bowers, 358 U. S. 522, 526, 79 S. Ct. 437, 3 L. Ed. 480, 484 (1959). Where a federal right is concerned, the Court must inquire into "'the real nature of the tax and its effect upon the federal rights asserted.'" Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 151, 75 S. Ct. 607, 99 L. Ed. 950, 959 (1955). Under antitrust policy of the federal government it is clear that a private company is not permitted to create the competitive situation here that the taxing bodies have, and particularly are not permitted to create a situation which gives an economic advantage to less than all of the parties in the market area involved. The problems of the Borden Company in this regard are most enlightening. See United States v. Borden Company, 370 U. S. 460, 82 S. Ct. 1309, 8 L. Ed. 2d 627 (1962) and Federal Trade Commission v. Borden Company, 383 U. S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153 (1966). Here, the taxpayer is competing directly with its suppliers, (United States Steel Corporation, Aluminum Company of America and many others), none of which would be permitted to create the competitive imbalance by pricing procedures that the taxing bodies have by their tax imposition. The federal policy in this area is overriding and controlling any state law intruding into this area must be subject to the overriding federal policy. See, *e.g., Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964).

As pointed out above in connection with the cases cited in Section II, this Court has jurisdiction to accept a challenge to the constitutionality of a state statute and the

statute must be held to have the precise meaning given to it by the State Supreme Court. Those cases are cited for that purpose only.

Accordingly, since the matters presented are substantial in nature, they require either a plenary hearing before this Court or a remand to the Pennsylvania Supreme Court for an initial plenary hearing and decision by that Court.

VI. Matters Appended

All matters are appended hereto as required by Rule 15 of the Supreme Court Rules. In addition, certain other matters have also been included for the convenience of the Court. These matters are listed in the Index to the Appendix.[2]

Respectfully submitted,

NORMAN J. COWIE, ESQUIRE,
Attorney for Williams and Company, Inc., Appellant.

Thomson, Rhodes & Grigsby,
Of Counsel.

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[2] As indicated in part II above, there is no final judgment or decree as such from the Supreme Court of Pennsylvania. The opinion of the Court serves this purpose.

APPENDICES

Appendix A

IN THE COUNTY COURT
OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLIAMS AND COMPANY, INC.,
Appellant,

vs.

THE CITY OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

No. A725 of 1964.

WILLIAMS AND COMPANY, INC.,
Appellant,

vs.

SCHOOL DISTRICT OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

No. A726 of 1964.

PETITION TO RE-OPEN HEARING.

Now comes Williams and Company, Inc., the appellant and taxpayer in the above numbered appeals, by its attorneys and moves the court to re-open the above cases and

take additional testimony and in support thereof says as follows:

1. These two cases are appeals from the determination by the Treasurer's offices of the respective taxing bodies assessing certain mercantile taxes against the appellant and taxpayer.

2. Following the formal appeals in these cases the matter came on before this court on Tuesday, November 10, 1964 at which time the taxpayer alone presented evidence and testimony and the taxing bodies participated through their respective solicitors.

3. Thereafter the taxpayer, in an effort to be conciliatory, abandoned certain of its positions and submitted findings of fact and conclusions of law to the court embodying these efforts at conciliation.

4. The taxing bodies, after studying the matter, concluded that they were in basic agreement with the appellant and taxpayer's position as stated in this proposed findings and conclusions and ultimately a consent order was drawn embodying the oral agreement between the parties.

5. This order was prepared by counsel for the appellant and taxpayer. It was signed by counsel for the appellant and taxpayer. It was thereupon submitted to the solicitor for the City of Pittsburgh who consented to the order and forwarded the same to the solicitor for the School District of Pittsburgh.

6. Your petitioner is informed that upon receipt by the School District the consent order was initially approved and then immediately before it was to be delivered to counsel for the appellant and taxpayer, or to the court,

the School District of Pittsburgh reversed its position and determined to litigate the matter after appellant and taxpayer would not concede to the new and entirely different position that it had just then taken and of which it then notified the appellant and taxpayer.

7. In view of the fact that the matter will now proceed to litigation, your petitioner now wishes to assert a defense that the mercantile taxes as levied against it are unconstitutional on the ground that it, the appellant and taxpayer, is being denied due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

8. The appellant and taxpayer is in the business of selling and distributing for itself and for others certain materials such as nickel, stainless steel, copper, aluminum, carbon steel products and steel tubing. Taxpayer does business with manufacturers, fabricators, processors and research and maintenance people among others.

9. The appellant and taxpayer is in a highly competitive industry and is forced to compete directly both within and without the City of Pittsburgh with other persons engaging in the same business activities in which it engages who are not subject to the taxes sought to be levied against the appellant and taxpayer.

10. The taxes sought to be levied against the taxpayer are discriminatory and confiscatory and financially damaging to the appellant and taxpayer's competitive position on the open market.

11. The mercantile tax statutes and ordinances as enacted and applied have given unfair and undue economic advantage to the appellant and taxpayer's competitors, in

many cases completely exempting them from any taxation at all, and have denied to the appellant the competitive advantages afforded to many of its competitors.

WHEREFORE, the appellant and taxpayer prays that the court will grant the following relief to it:

(1) Permit it without prejudice to any of its rights to completely withdraw its original proposed findings of fact and conclusions of law and file new findings of fact and conclusions of law embodying its original position in the case;

(2) Compel the School District of Pittsburgh to return to counsel for the appellant and taxpayer the proposed consent order which it has refused to return and which is the work product of counsel for the appellant and taxpayer; and

(3) Re-open the hearing to take testimony on the appellant and taxpayer's position that the mercantile tax statutes and ordinances as enacted and applied to it deprive it of due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

PRINGLE, BREDIN, THOMSON,
RHODES & GRIGSBY,

By NORMAN J. COWIE,
Attorneys for Williams and Company, Inc., appellant and taxpayer.

ORDER OF COURT.

And now to wit this .... day of ....., 1965, upon petition of the appellant and taxpayer Williams and Company, Inc. and after due consideration,

IT IS ORDERED that the appellant and taxpayer be permitted without any prejudice to itself whatsoever to withdraw its proposed findings of fact and conclusions of law and submit new findings of fact and conclusions of law based upon its original position in the above litigation;

IT IS FURTHER ORDERED that the School District of Pittsburgh return to counsel for the appellant and taxpayer the proposed consent order which he forwarded to the School District of Pittsburgh, which the School District has refused to sign and which is the work product of counsel for the appellant and taxpayer;

IT IS FURTHER ORDERED that the hearing be re-opened and that the appellant and taxpayer be permitted to produce whatever relevant competent evidence it has on the federal constitutional issues raised by it in the foregoing petition.

.....,
President Judge.

Appendix B

IN THE COUNTY COURT
OF ALLEGHENY COUNTY, PENNSYLVANIA

WILLIAMS AND COMPANY, INC.,
Appellant,

vs.

THE CITY OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

No. A 725 of 1964.

WILLIAMS AND COMPANY, INC.,
Appellant,

vs.

SCHOOL DISTRICT OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

No. A 726 of 1964.

MEMORANDUM AND ORDER.

LENCHER, *P. J.*

We have heard all of the evidence in this appeal from the mercantile license tax assessment filed at the numbers and terms above indicated—from the final orders of the tax collector made under the Acts of 1947, specifically revealed in the pleadings. Actually the major core of facts is not disputed but involves the resolution of uncontested and uncontradicted evidence indicating the gross receipts of the Appellant in its capacity either as a broker or as a

retail vendor. We have carefully looked at what we believe to be proper guidance in such appellate court cases as the *Tax Review Board of Philadelphia vs. Elster & Prager,* 406 Pa. 543, 178 A. 2d 611 (1962) and *Jones vs. City of Pittsburgh,* 176 Pa. Super. 154, 106 A. 2d 892 (1954). Recalling the additional policy announced in the appellate court cases which directs us to resolve reasonable doubts in favor of the taxpayer, we believe the mixed questions of law and fact arising out of what is largely uncontradicted testimony, constrains us to make, and we do make the following order.

And Now, to wit, this 20th day of January, 1967, after a full hearing on the merits of the appeals above indicated, and after due consideration,

It is Ordered that all sales made from warehouse consigned stocks of the type and class of Revere Copper and Brass shall be deemed to be factored transactions;

It is Further Ordered that all other sales from warehouse consigned stocks shall be deemed to be retail transactions except as any such sales have or may be agreed upon by the parties hereto to be wholesale transactions;

It is Further Ordered that all sales made by the taxpayer involving shipments or products directly from the supplying mills to the purchaser and characterized by the parties as "direct mill business" and "mill direct transactions" shall be deemed to be brokered transactions;

It is Further Ordered that the question raised as to the taxes paid under protest for the years 1962 and 1963 shall be governed and controlled by the final decision of the Superior Court of Pennsylvania in the cases of *T. Y. Schomaker, et al. vs. City of Pittsburgh, et al.* (No. A 1932 of 1963 in this Court) and *T. Y. Schomaker, et al. vs. School*

District of Pittsburgh, et al. (No. A 1933 of 1963 in this Court), affirmed December 16, 1965, at 215 A. 2d 279, 207 Pa. Super. 199.

The case last mentioned reviews the power of the tax collector at bar to make deficiency assessment. After the Supreme Court had laid down the rule in Kerchner, *et al.* v. City of Pittsburgh, *et al.*, 176 A. 2d 645, 406 Pa. 158, declaring retail and not wholesale the tax due on gross receipts in that case where the taxpayer's customer purchased and resold the very thing itself, the demand of the taxpayer that he be assessed once again on a wholesale basis was rejected, as it must be at bar in the field in which the issue is here raised. Moreover, we cannot and do not sustain the constitutional objection of the taxpayer, that the tax assessed against the taxpayer's supplier should be wholesale while the taxpayer at bar pays the retail tax—this is not a matter for this Court's disturbance. Over and over again, our appellate courts have made abundantly clear as to the tax enactments, local resolutions and ordinances, that we are to declare them unconstitutional and/or void only when the provision violates the constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds: Sharpless v. Phila., 21 Pa. 147, 164 (1853); Heisler v. Thomas Colliery Co., 273 Pa. 448, 458, 118 A. 394 (1922); classification under the constitution is necessarily elastic: Turco Paint & Varnish Co. v. Kalodner, 320 Pa. 421, 434, 184 A. 37 (1936). See the various forms and divisions of classifications specifically enumerated at page 537, case of Coe, *et al.* v. Duffield, 138 A. 2d 303, 185 Pa. Superior Court 532. It will not be for this reviewing Court to make the taxing classifications. Repeatedly, our appellate courts have sustained the classifications here under attack.

When specifically liquidated by counsel, judgment will be entered accordingly, and it is further ordered that the parties shall bear their own costs; exception noted to each of the parties and bill sealed.

BY THE COURT:
s/ LENCHER, *P. J.*

Appendix C

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WILLIAMS AND COMPANY, INC.,
Appellant,
vs.
THE CITY OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

County Court of Allegheny County,
No. A 725 of 1964.

WILLIAMS AND COMPANY, INC.,
Appellant,
vs.
SCHOOL DISTRICT OF PITTSBURGH, a municipal corporation, and DAVID A. SMITH, Treasurer,
Defendants.

County Court of Allegheny County,
No. A 726 of 1964.

ANSWER TO PETITION FOR WRIT OF CERTIORARI UNDER RULE 68½

Now comes Williams and Company, Inc., and makes its answer to the Petition for Writ of Certiorari Under Rule 68½ as follows:

1. Paragraph One (1) of the Petition is admitted.

2. Paragraph Two (2) of the Petition is admitted insofar as it states that the Petitioners are aggrieved by the

order and judgment of the court below inasmuch as they were unfavorable and adverse to the Petitioners. The orders and the judgment of the court below were in all respects proper. The Petitioners are not aggrieved by the orders of August 31, 1964 and November 10, 1964 since they agreed and consented to the entry thereof.

3. The following Answer is made to Paragraph Three (3) of the Petition:

QUESTIONS OF LAW INVOLVED

(1) Does a person sell as a retail vender under the Mercantile License Tax Act of the School District of Pittsburgh (Act of June 20, 1947, P. L. 745, 24 P. S. §§ 582.1 *et seq.*) and similar ordinance of the City of Pittsburgh where said person fills orders not from warehouse stock but by obtaining the products desired by its customer from a mill supplier and directs the mill supplier to ship directly to the customer, the transaction between the person and the mill supplier on the one hand and between that person and the customer on the other, being completely interrelated and interdependent, and where the source of supply by agreement with that person restricts its commission to a fixed percentage of list price established by the mill supplier, said agreement being entered into for the basic purpose of obtaining a market for the mill supplier's goods?

Answered in the negative by the Court below.

(2) Under the same factual situation, does that same person act as a "broker"?

Answered in the affirmative by the Court below.

STATEMENT OF FACTS

1. Statement number One (1) is admitted.

2. Statement number Two (2) is admitted.

3. Statement number Three (2) is admitted.

4. Statement number Four (4) is admitted with the following addition. The School District's claim for additional tax is for the years 1962 to the present and apparently into the indefinite future. The claim of the City of Pittsburgh is for the years 1962 through 1965. The City of Pittsburgh so amended its ordinance, effective January 1, 1966, as to eliminate the matters of which the taxpayer makes complaint, and no issue exists between the taxpayer and that taxing body subsequent to 1965.

5. Statement number Five (5) is admitted subject to the limitations set forth in the answer to Statement number Four (4).

6. Statement number Six (6) is admitted subject to the limitations set forth in the answer to Statement number Four (4).

7. Statement number Seven (7) is denied. On the contrary it is averred that mill direct sales are conducted as follows:

a. The customer places an order with the taxpayer and agrees to take the shipment from taxpayer f. o .b. supplier's mill; the intention of the agreement is that the purchaser whom the taxpayer secures will take the goods as soon as they are ready for shipment aboard the carrier's equipment at the mill;

b. The taxpayer then contacts the mill supplier and has the supplier agree to supply the desired ma-

terials f. o. b. mill, *i.e.*, under the same terms and conditions that the buyers agreed to purchase from it and with the same intention that once the property is on board the freight carriers equipment ready for delivery the ownership and risk pass from it to the buyer.

c. If any title passes to the taxpayer in this type of transaction, the title passes to the mill supplier at the very moment it passes to the taxpayer.

d. The taxpayer is involved in a strictly paper transaction in which it brings together a buyer and a seller and receives a percentage of its sale price as a commission for its efforts.

e. The mill supplier forwards its invoice to the taxpayer and the taxpayer forwards its invoice to the buyer. The buyer pays the full price to the taxpayer and the taxpayer in turn periodically remits the full price less its commission (called a "functional" or "factor" discount in the trade).

f. Most of the mill direct shipment transactions are not done pursuant to any provision of an overriding written agreement as suggested by Petitioners [see Statement 7 (d)] but rather are done on a general basis of prevailing custom and practice, transaction by transaction.

CONTENTIONS AND AUTHORITIES

The taxpayer respectfully suggests that the lower court properly construed "mill direct" transactions of the taxpayer as being brokerage sales and not retail sales. This may be developed upon a sound legal basis as set forth by the lower court and briefly as follows:

I. IN VIEWING THE MILL DIRECT TRANSACTION AS A WHOLE, THE TRANSACTION IS CLEARLY A BROKERED ONE AND IS NOT RETAIL IN NATURE.

The Petitioners would have the transactions characterized by reference to certain of their parts rather than in their entirety as whole commercial undertaking. The Court must characterize the whole and not the individual parts.

The lower court, in examining the transactions as a whole, and with due regard for customary commercial practices, held that the case at bar was controlled by *Tax Review Board of Philadelphia vs. Elster & Prager,* 406 Pa. 543, 178 A. 2d 611 (1962) and *Jones vs. City of Pittsburgh,* 176 Pa. Super. 154, 106 Pa. Super. 892 (1954). In the *Jones* case, the Court defined "merchandise brokers" as "those who buy and sell goods, and negotiate between buyer and seller, but without having custody of the property." 106 A. 2d at 894. The taxpayer, like all merchandise brokers, holds itself out to the public or to manufacturers generally as offering to sell their products. These brokers have authority to make binding agreements and are compensated by a commission. All of this is present here. No orders are placed until the customer for the order is first obtained. The taxpayer collects the sums due for the mill suppliers and periodically accounts by remitting the sum involved less commissions. The *Elster & Prager* case and the *Jones* case also emphasize the proposition that any doubts in the taxpayer's tax status are to be resolved in its favor.

The cases cited by the Petitioners are inapposite and involve questions of *del credere* agency and factual situations readily distinguishable from the case at bar. They are helpful to the extent that they are quite clear that

each case must be decided on its own facts. Those facts have been resolved against the Petitioners below and properly so.

II. UNDER THE APPLICABLE FEDERAL LAW, THE APPLICATION OF THE STATE TAX LAW SOUGHT BY THE PETITIONERS IS UNCONSTITUTIONAL AND CONTRARY TO OVERRIDING FEDERAL POLICY.

This question was raised in the Court below and appears to have been misunderstood by that court. The constitutionality of the mercantile tax law as a general proposition was never questioned. The Court below thought that it was. The constitutional question related to the *application* of the law in this case as contended for by the taxing bodies. The point is that since the taxing bodies' position was rejected by the court below, there was no constitutional question for it to decide. However, if this Court does feel that there is any merit to the Petitioners' position, then the question must clearly be decided by this Court.

To state the matter simply, the taxpayer is in direct competition with such companies as the Aluminum Company of America, United States Steel Corporation, Revere Copper & Brass, and many other large corporations in this market area. Many, if not all, of the companies involved would not be subject to the same tax in the same market area although they are direct competitors. This is an unconstitutional application of the tax laws. *Cf. State of Alaska vs. Arctic Maid,* 366 U. S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961), where, in sustaining the constitutionality of the application of the tax laws there, the Court emphasized that the taxpayer was *not* in competition with the other companies whose tax position was more favorable. This was a very material point in the case. 366 U. S. at

204, 6 L. Ed. 2d at 231. The crucial aspect lacking in *Arctic Maid* is glaringly present here *if* there is any merit to the Petitioner's position.

The taxing bodies would also be giving the other competitors an advantage in pricing in the market area which they would be barred from achieving for themselves under the federal anti-trust laws. Illustrative are the problems of the Borden Company as set forth in *Federal Trade Commission vs. Borden Company,* 383 U. S. 637, 86 S. Ct. 1092, 16 L. Ed. 2d 153 (1966), and *United States vs. Borden Company,* 370 U. S. 460, 82 S. Ct. 1309, 8 L. Ed. 2d 627 (1962). The federal policy in this area is overriding and controlling and any state laws affecting this area must give way to the overriding federal policy. See *Hudson Distributors, Inc. vs. Eli Lilly & Co.,* 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964).

CONCLUSION

The taxpayer respectfully contends that the lower court was correct in classifying Williams and Company, Inc. as a broker with respect to its mill direct sales. Any merit that may appear in the Petitioners' position is destroyed (1) by the unconstitutional application of the law which would manifestly result from the acceptance of Petitioners' position and (2) the conflict between what Petitioners desire to do and the overriding federal interest in the market area with which Petitioners would interfere.

WHEREFORE, the Respondent taxpayer respectfully suggests that the Petition for Writ of Certiorari be denied.

PRINGLE, BREDIN, THOMSON,
RHODES & GRIGSBY,

By NORMAN J. COWIE,
Attorneys for Williams and Company, Inc.

Appendix D

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 38 & 39 March Term, 1968.

WILLIAMS AND COMPANY, INC.,
v.
THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, a Municipal Corporation, and DAVID A. SMITH, City and School Treasurer,
Appellants.

Appeals from the Judgments of the County Courts of Allegheny County to Nos. A725 and A726 of 1964.

No. 38 entered: 9/22/67.

No. 39 entered: 9/26/67.

OPINION.

(Filed-July 1, 1968.)

EAGEN, *J.*

These appeals present a dispute between the School District of the city of Pittsburgh (hereinafter District) and Williams and Company (hereinafter Taxpayer), a distributor of metal products located in the city of Pittsburgh, as to the correct amount of mercantile taxes due from Taxpayer for the years 1962 and 1963.

The District imposes a tax on all mercantile sales by authority of the Act of June 25, 1947, P. L. 1145, as amended, 53 P. S. § 6851 *et seq.* The tax rate on retail sales is one mill based on the gross volume of business. The rate on brokers' sales is one-half mill based on gross commissions.

About 80 per cent of the Taxpayer's sales are filled by delivery from its own warehouse. The remaining 20 per cent are filled by shipment from suppliers directly to Taxpayer's customers. It is the proper classification for mercantile tax purposes of these sales filled through direct shipment that is the sole subject of this dispute. The District contends they are "retail sales" under the pertinent ordinances and statutes. The Taxpayer argues they are "brokerage transactions." The court below decided the question in favor of the Taxpayer and, since the amount in controversy had already been paid under protest, entered judgments in the Taxpayer's favor for that amount. The District appeals.

These briefly are the pertinent facts:

All orders, including those for the sales in controversy, are solicited and secured by salesmen of Taxpayer. When an order is obtained which involves a quantity in excess of its warehouse supply, the Taxpayer accepts the order from its customer and then places its own order with the supplier for the same quantity of material, but arranges for shipment to be made directly to the customer. Taxpayer never handles the subject of the order. The supplier bills Taxpayer in accordance with its list price. Depending upon the supplier, product and volume, Taxpayer is allowed a discount of 5%, 7% or 10%. Taxpayer bills and collects from its customer in every instance. The charge is 100% of the supplier's list price.

We cannot subscribe to the lower court's conclusion that the sales involved are brokerage transactions. A broker is one whose business it is to bring buyer and seller together. *Keys v. Johnson,* 68 Pa. 42 (1871). He is a person who negotiates a contract of sale *between* merchants who are the parties to the transaction. See 12 C. J. S., Brokers, §§ 1a, 3 (1938). The mere fact that the Taxpayer's earnings on these sales are in the form of a discount received from the supplier is not determinative of its status: *Hamberger v. Marcus,* 157 Pa. 133, 27 A. 681 (1893). It is only one circumstance to be considered in evaluating the true situation.

In the instant case, Taxpayer is much more than a "negotiator" between the supplier and the customer. It buys the goods involved on its own account and sells them to the customer on its own terms. Two separate contracts are involved in these transactions. One between Taxpayer and the supplier; another between Taxpayer and its customer. There are several suppliers involved and their contracts with the Taxpayer vary somewhat, but typically the supplier agrees to "sell" and the Taxpayer agrees to "buy." The Taxpayer's contract with International Nickel also provides:

> "Shipments Direct to Consumers. Shipments of products described in Annex A will also be made direct to consumers purchasing from you, for your account and against purchases of such products made by you from us pursuant to Clause (1) above. On all such shipments all expense of transportation from the points of shipment, freight, trucking, cartage, wharfage tolls, handling charges, demurrage, etc., and the risk in transit, shall be borne by you, and title shall pass to you f. o. b. the points of shipment."

The Taxpayer's contract with Aluminum Company of America provides:

> "Sales by Distributors. It is intended by the parties that Distributor will sell for its own account Products which it purchases hereunder, and will solicit orders with respect hereto prior to withdrawal thereof from stock, but no sales shall be made by Distributor as agent for, or other representative of, Alcoa, nor shall any sales or contracts made by Distributor make or purport to make Alcoa a party thereto, nor shall Alcoa incur any liability thereby or therefor."

In the contract between Taxpayer and customer, the latter agrees to take shipment f. o. b. mill, *i.e.*, it assumes the risk of loss in transit and, unless otherwise specified, the cost of the freight bill.

These two separate contracts, one between the Taxpayer and supplier and the other between the Taxpayer and its customer, cannot accurately be collapsed into one, leaving Taxpayer a mere conduit between supplier and customer. The Taxpayer's rights and obligations reflect its status as a real buyer who resells the supplier's products. For example, the suppliers look only to the Taxpayer for payment and the Taxpayer bears the risk of nonpayment by its customers. This indicates that the Taxpayer is a party to two separate transactions, one a purchase from the supplier and one a sale to its own customer. See *Commercial Credit Company v. Girard National Bank,* 246 Pa. 88, 92 A. 44 (1914).

Tax Review Board v. Elster & Prager, 406 Pa. 543, 178 A. 2d 611 (1962), heavily relied upon by Taxpayer, is not controlling. Therein the distributor was a mere conduit. The supplier assumed the risk for the loss or damage of

the goods while they were in the custody of the distributor and the latter had the right to return any of the merchandise unsold and to pay the supplier only for the merchandise actually sold. The facts in the instant case are more analogous to *Brown & Zortman Machinery Co. v. Pittsburgh,* 375 Pa. 250, 100 A. 2d 98 (1953), and *Commonwealth v. Thorne Neale & Co.,* 264 Pa. 408, 107 A. 814 (1919).

Finally, it is contended the mercantile tax law involved as it is applied to Taxpayer is unconstitutional because many of its competitors, large manufacturing corporations, some of which are Taxpayer's suppliers, who sell directly to the consumer are not subject to the same tax, and it is, therefore, discriminatory. This contention is without merit. A tax based on a reasonable classification is not unconstitutional simply because its application places one of the classes at a competitive disadvantage. *Commonwealth v. Life Assurance Co. of Pa.,* 419 Pa. 370, 382-89, 214 A. 2d 209, 217-220 (1965).

Reversed.

Mr. Chief Justice Bell did not participate in the consideration or decision of this case.

Appendix E

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 38 & 39 March Term, 1968.

WILLIAMS AND COMPANY, INC.,
vs.
THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, a Municipal Corporation, and DAVID A. SMITH, City and School Treasurer,
Appellants.

Appeals from the Judgments of the County Courts of Allegheny County to Nos. A725 and A726 of 1964.

No. 38 entered: 9/22/67.

No. 39 entered: 9/26/67.

PETITION FOR REARGUMENT.

Now comes Williams and Company, Inc., by its attorneys, Pringle, Bredin, Thomson, Rhodes & Grigsby, and petitions for a reargument of the above case, and in support thereof says as follows:

1. On July 1, 1968, this Court filed an opinion reversing the decision of the lower court. A true and correct copy of this opinion is attached to the original (ribbon copy)

of this petition filed with Court. In the course of making its determination, this Court may have overlooked or misapprehended certain issues which were raised specifically and which will be specified with particularity in the following paragraphs.

2. An issue was raised as to whether the cases cited by the appellant, and now cited by the Court, were in keeping with modern mercantile practices. Specifically, the authorities cited are from 1871, 1893 (p. 2 of the opinion), 1914, 1953 and 1919 (p. 4). The 1953 case simply relies upon the old cases. It was submitted in appellee's brief (p. 9) and is again submitted that 1968 mercantile practices cannot realistically be controlled by nineteenth century mercantile traditions. The 1914 case cited on page 4 of the opinion (*Commercial Credit Company vs. Girard National Bank,* 246 Pa. 88, 92 Atl. 44) rests upon *In re White* and *In re Nevill,* 6 Ch. Ap. 397, two old cases decided in England at an unknown date, and *Ex Parte Flannagans,* 2 Hughes 264, a case decided by United States District Court in Eastern Virginia in 1875.

This Court in *Flagiello vs. Pennsylvania Hospital,* 417 Pa. 486, 208 A. 2d 193 (1965), pointed out that if prior judicial decisions appear to be out of accord with modern conditions of life, those decisions should no longer be followed. Another way of stating the matter is that if changes occur in common ordinary modern business practices, the common law must reflect these changes since the current standards of the community are what the common law is supposed to mirror. The common law has always been a system of elementary principles and of general judicial truths which continually expand (hopefully) with the progress of society and adapt themselves to the gradual changes of trade and commerce and the exigencies and usages of

the community. The Chief Justice of this Court has recently observed: "In the last few years, the Supreme Court of Pennsylvania has radically changed the law in 30 different branches or fields which, prior thereto, had been firmly established." *Webb vs. Zern,* 422 Pa. 424, 429, 220 A. 2d 853, 855 (1966). (Dissenting opinion.) Certainly the suggestion that the commercial law should conform to modern commercial practices requires the making of no changes in the law to the extent of those made in recent years by this Court in such cases as *Flagiello* and *Webb.* Certainly commercial litigants suffering injustice by the application of old outmoded applications of the law are entitled to as much judicial relief as personal injury litigants.

3. The Court also purported to decide the constitutional question presented on the supposition that the taxpayer was attacking the reasonableness of its classification as a retailer. This issue, which the Court decided under *Pennsylvania* law, was *never* raised by the taxpayer-appellee. The question raised by the appellee relates to the constitutionality of the interpretation given to the mercantile tax law which issue was raised, and must be decided, under *federal* law. Specifically, the question is whether the local taxing bodies can constitutionally discriminate between competitors in the same market by taxing one at one rate and a second at another. Here, most of the taxpayer's competitors are not taxed at all. The lower court held that the taxpayer's transactions should be taxed at a broker's rate, which was sufficiently low as not to interfere with the taxpayer's competitive position. This Court has now increased the tax by 40 times and has materially effected the taxpayer's ability to compete. This case is clearly governed by *State of Alaska vs. Arctic Maid,* 366 U. S. 199, 81 S. Ct. 929, 6 L. Ed. 2d 227 (1961). This argu-

ment was presented to the Court in appellee's brief at pp. 13ff. It is purely a question of *federal* law.

4. The Court also did not pass upon the issue raised in conjunction with the constitutional issue set forth in Paragraph 3, *supra*. The basic proposition is that the federal anti-trust policy regulating the various aspects of market control are paramount and overriding and the local taxing bodies can no more interfere with the balance of competition in the market area than can a private litigant. One distributor must not create conditions prejudicial to another distributor and working to the detriment of the competitive market and that distributor. The taxpayer-appellee here contends, as it has throughout, that the local taxing bodies may not create such conditions themselves which are within the range of prohibition to competitors. This question and the argument thereon are developed on pp. 16-19 of appellee's brief.

5. In view of the decision of the Court, the taxpayer-appellee now further contends that the failure of this Court to decide the issues set forth in Paragraphs 3 and 4, *supra*, in itself constitutes a denial of due process of law. Both issues were presented to the lower court. Since the lower court ruled in favor of the taxpayer-appellee, it had no real occasion to decide the two issues presented. The lower court did decide *a* constitutional question, but one that the taxpayer *never* raised (This has now happened *twice*). This Court by now reversing the lower court has made the constitutional questions quite relevant. Yet the Court has *not* decided *these* questions. The taxpayer-appellee has a constitutional right to have properly raised constitutional issues decided and urges this as an additional ground for reargument.

WHEREFORE, your petitioner respectfully requests that your Honorable Court grant to it a reargument for the reasons set forth above.

PRINGLE, BREDIN, THOMSON,
RHODES & GRIGSBY,

By NORMAN J. COWIE,
Attorneys for Taxpayer-Appellee.

Appendix F

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 38 & 39 March Term, 1968.

WILLIAMS AND COMPANY, INC.,
vs.
THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, a Municipal Corporation, and DAVID A. SMITH, City and School Treasurer,
Appellants.

Appeals from the Judgments of the County Courts of Allegheny County to Nos. A725 and A726 of 1964.

No. 38 entered: 9/22/67.

No. 39 entered: 9/26/67.

ANSWER TO THE PETITION FOR REARGUMENT PRESENTED BY WILLIAMS AND COMPANY, INC., APPELLEE.

To the Honorable Chief Justice and Justices of the Supreme Court of Pennsylvania:

The City of Pittsburgh and School District of Pittsburgh, Appellants, as of the above Court, terms and numbers, file this Answer to the Petition for Reargument

Presented by Williams and Company, Inc., Appellee, and respectfully represent:

1. It is denied that your Honorable Court has overlooked or misapprehended any points or issues which were raised specifically by Appellee in its Brief or upon oral argument. On the contrary, it is submitted that a review and reargument of the issues raised by Appellee in its Brief and/or at argument will be merely a restatement of the matters heard by your Honorable Court and decided in the Opinion filed by your Honorable Court on July 1, 1968.

2. Denied. It is denied that any issue may properly be raised regarding the duty of your Honorable Court to apply the established law to the facts in the within case. Appellee seeks to have this Court *overrule* a long line of well reasoned and oft-cited cases, including the well-established case of *Commonwealth v. Thorne, Neale & Co.*, 264 Pa. 408, 107 A. 814 (1919). The elementary principles of tripartite sales transactions as recently re-affirmed in *Brown & Zortmann Machinery Co. v. City of Pittsburgh*, 375 Pa. 250, 100 A. 2d 98 (1953) should not be overturned merely to conform to so-called "modern commercial practices". As set forth by Justice Musmanno in the *Brown & Zortmann* case, *supra*, the taxpayer in each mercantile license case falls into one class or another through objective facts, and not through presumption.

3. Denied. It is denied that any federal constitutional question is, or was, presented in the within Appeals. The Record is, at the very least, inconclusive as to any effect on taxpayer's ability to compete based upon its tax classification. The taxpayer's witness, Carl Kleinschmidt, testified that a number of factors influence taxpayer's competitive position and that the mercantile tax would be, at best,

just one of these many factors. It is almost impossible to attribute the fractional differences in prices bid to any one specific cost factor (R. 85a-86a). More significantly, the difference in tax rate of which Appellee complains results from the allowance of the well-established manufacturer's exemption, which exemption has been reviewed and upheld by this Honorable Court. *Appeal of Atlantic Refining Co.*, 398 Pa. 30, 156 A. 2d 855 (1959). It is denied that the Record bears out Appellee's contention that most of the taxpayer's competitors are not taxed at all (R. 87a-88a).

4. Denied. It is denied that federal anti-trust policy is in any way material to the within case. The exemption granted manufacturers has been most recently re-affirmed by our Legislature in the Local Tax Enabling Act, Act of Dec. 31, 1965, P. L. 1257, § 2(4), 53 P. S. § 6902(4). The tension here created is not between two distributors, as Appellee suggests, but rather between a manufacturer of goods who elects to sell his product both directly to consumers and through merchants, and the merchant who must thereby compete with his own supplier, the manufacturer. *All* merchants who buy goods to sell again come under the *same* taxing rates and there is no prejudice as between retail vendors.

5. Denied. It is denied that your Honorable Court failed to decide the issues set forth in Paragraphs 3 and 4 of Appellee's Petition for Reargument. On the contrary, Williams and Company, Inc., in its brief devoted in excess of six (6) pages in support of its argument that:

> "Under the controlling federal law, the application of the law which the taxing bodies seek to assert against the taxpayer is both an unconstitutional discrimination

against the taxpayer and contrary to overriding federal anti-trust policy." Brief for Appellee, pp. 13-19.

The assertion of unconstitutional discrimination was considered by the Court. We quote from the Court's Opinion, wherein Justice Eagen states, at page 4:

> "Finally, it is contended the mercantile tax law . . . is unconstitutional . . . and it is . . . discriminatory. This contention is without merit."

WHEREFORE, it is respectfully submitted on behalf of the Appellants that the Petition for Reargument should be refused, for your Honorable Court neither overlooked nor misapprehended any of the points raised in the Appellee's Petition for Reargument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NO. 706 OCTOBER TERM, 1968

WILLIAMS AND COMPANY, INC., Appellant
v.
THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, and DAVID A. SMITH, City-School Treasurer, Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS. 38 AND 39 MARCH TERM, 1968.

MOTION TO DISMISS OR AFFIRM

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INDEX

	PAGE
Motion To Dismiss Or Affirm	1
I. The State Statutes Involved and the Nature of the Case	2
A. The Statutes	2
B. The Proceedings Below	3
II. Argument	4
A. The Case Presents No Substantial Question Not Previously Decided by This Court	4
B. The Judgment Rests Upon an Adequate Non-Federal Basis	6
Conclusion	8

TABLE OF CITATIONS

CASES

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959)	4
American Sugar Refining Co. v. Louisiana, 179 U.S. 89, 21 S. Ct. 43, 45 L. Ed. 102 (1900)	4, 5
Black v. Cutter Laboratories, 351 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956) rehearing denied 353 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69	7
Brown & Zortmann Machinery Co. v. City of Pittsburgh, 375 Pa. 250, 100 A. 2d 98 (1953)	6
Brown-Forman Co. v. Commonwealth of Kentucky, 217 U.S. 563, 30 S. Ct. 578, 54 L. Ed. 883 (1910)	5
Commercial Credit Company v. Girard National Bank, 246 Pa. 88, 92 A. 44 (1914)	6
Commonwealth v. Banker Brothers Co., 38 Pa. Super. 101, aff'd, 222 U.S. 210 (1911)	6
Commonwealth v. Thorne, Neale & Co., 264 Pa. 408, 107 A. 814 (1919)	6

Table of Citations.

CASES	PAGE
Heisler v. Thomas Colliery Co., 274 Pa. 448, 188 A. 394, 24 A.L.R. 1215, aff'd, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237 (1922)	5
Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965)	7
Norris Brothers v. Commonwealth, 27 Pa. 494 (1856)	6
Quong Wing v. Kirkendall, 223 U.S. 59, 32 S. Ct. 192, 56 L. Ed. 350 (1912)	5
Rast v. Van Deman & Lewis Co., 240 U.S. 342, 36 S. Ct. 370, 60 L. Ed. 679 (1916)	5
State Bd. of Tax Comm'rs. of Indiana v. Jackson, 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931)	4
Stebbins v. Riley, 268 U.S. 137, 45 S. Ct. 424, 69 L. Ed. 884 (1925)	4
The Air Scale Co. v. Nock Co., 98 Pa. Super. 400 (1930)	6
Union Bank & Trust Co. v. Phelps, 288 U.S. 181, 53 S. Ct. 321, 77 L. Ed. 687 (1933)	4
Williams and Company, Inc. v. City of Pittsburgh, 430 Pa. 509, 244 A. 2d 37 (1938)	3

STATUTES	
Act of June 25, 1947, P.L. 1145, as amended 53. Purdon's Pa. Statutes §§ 6851 *et seq.*	2
Act of June 20, 1947, P.L. 745, as amended, 24 Purdon's Pa. Statutes §§ 582.1 *et seq.*	2

IN THE

Supreme Court of the United States

NO. 706 OCTOBER TERM, 1968

WILLIAM AND COMPANY, INC., Appellant

v.

THE CITY OF PITTSBURGH and SCHOOL DISTRICT OF PITTSBURGH, and DAVID A. SMITH, City-School Treasurer, Appellees

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA AT NOS 38 AND 39 MARCH TERM, 1968.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Rules of this Court, the City of Pittsburgh, School District of Pittsburgh, and David A. Smith, City-School Treasurer, as Appellees, move that the appeal be dismissed, or, alternatively, that the judgment of the Supreme Court of Pennsylvania be affirmed, on the following grounds:

1. The appeal does not present a substantial federal question.

2. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

3. The judgment rests upon an adequate non-federal basis.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A.

The Statutes

This appeal raises the question of the application of certain provisions of the mercantile tax laws of the City of Pittsburgh and School District of Pittsburgh. The City imposes a tax on mercantile sales under the provisions of a local ordinance enacted by virtue of its authority found in the Acts of Assembly of Pennsylvania, Act of June 25, 1947, P.L. 1145, as amended, 53 Purdon's Pa. Statutes §§ 6851 *et seq.* The School District imposes its tax by authority of the Act of June 20, 1947, P.L. 745, as amended, 24 Purdon's Pa. Statutes §§ 582.1 *et seq.*

The application of the City and School District laws and regulations are identical in all material respects except as to the tax rate. The retail tax rate — 2 mills for the City; 1 mill for the School District — is double the wholesale tax rate, both of which are computed upon the gross volume of business. On the other hand, the rate for brokers — 1 mill for the City; ½ mill for the School District — is levied only upon gross commissions. Because of these differences, the proper classification of the sales in question is important both to the Appellant and the Appellees.

As to both taxing acts, an exemption is granted to manufacturers with respect to those goods, wares and merchandise of their own produce or manufacture.

The State Statutes Involved and the Nature of the Case.

The acts and ordinance provide for the self-assessment of the tax due by the taxpayer and the filing of appropriate mercantile tax returns with the taxing bodies. Appellees have the authority to examine the returns and make reassessments in accordance with the laws relating to mercantile transactions.

B.

The Proceedings Below

The Appellant had filed mercantile tax returns for the years 1960 and subsequent and paid the tax shown due thereon. Appellees reexamined Appellant's books and records and claimed additional mercantile taxes on the grounds that certain transactions previously reported by Appellant as being "wholesale sales" should have been reported, and the tax paid, as "retail sales".

Appellant thereupon paid the additional taxes under protest and filed appeals in the County Court of Allegheny County, Pennsylvania, contending, *inter alia,* that its sales filled through direct shipment from its suppliers to its customers were either wholesale or brokered transactions, rather than retail sales. The County Court agreed with Appellant's contention and held that the so-called "mill direct" sales were deemed to be brokered transactions. Upon appeal to the Supreme Court of Pennsylvania, the decision of the lower court was reversed. *Williams and Company, Inc. v. City of Pittsburgh,* 430 Pa. 509, 244 A. 2d 37 (1968).

II.

ARGUMENT

A. The Case Presents No Substantial Question Not Previously Decided by This Court.

Since the case of *American Sugar Refining Co. v. Louisiana,* 179 U.S. 89, 21 S. Ct. 43, 45 L.Ed. 102 (1900), it has been well established that state statutes in imposing a license tax upon persons and corporations while exempting from such tax certain classes upon the general theory of a manufacturer's exemption present no question under the Constitution of the United States and that it is proper governmental policy not only to classify subjects differently for purposes of taxation but also to exempt producers from taxation upon the methods employed by them to put their product on the market.

Appellant here seeks to assert a federal question merely because it finds itself having to compete with its own suppliers, some of whom enjoy the exemption afforded manufacturers under the acts here involved as to those goods which the vendor has, in fact, produced himself. Your Honorable Court has on numerous occasions refused to invalidate a tax solely on the basis of the economic disadvantage where the classification was not otherwise arbitrary. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1959); *Union Bank & Trust Co. v. Phelps,* 288 U.S. 181, 53 S. Ct. 321, 77 L. Ed. 687 (1933); *State Bd. of Tax Comm'rs of Indiana v. Jackson,* 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931); *Stebbins v. Riley,* 268 U.S. 137, 45 S. Ct. 424, 69 L. Ed. 884 (1925); *Heisler v. Thomas Colliery Co.,* 274 Pa. 448, 118 A. 394, 24 A.L.R.

1215, aff'd, 260 U.S. 245, 43 S. Ct. 83, 67 L. Ed. 237 (1922); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 36 S. Ct. 370, 60 L. Ed. 679 (1916); *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U.S. 563, 30 S. Ct. 578, 54 L. Ed. 883 (1910); *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 S. Ct. 192, 56 L. Ed. 350 (1912).

The Pennsylvania statutes here involved are patterned directly on the ruling in the *American Sugar Refining* case, *supra*, in that the Commonwealth has seen fit, in its legislative wisdom, to afford an exemption to certain classes of merchants whose goods and wares are products of their own manufacture. The fact that the Appellant is required to pay a tax at the retail rate on that 20% of his business which, for reasons of his own convenience, he elects to ship directly from his supplier to his customer does not give rise to any substantial federal question.

In point of fact, the Record is clear that the economic disadvantage of which Appellant complains is not borne out. The Appellant conceded, at time of trial, that it is virtually impossible to attribute the fractional differences between competitor's prices to any one cost factor and that, further, the mercantile tax here complained of would be, at best, just one of many factors influencing Appellant's competitive position. (R. 85a-86a).

The price discrimination cases referred to by Appellant at page 10 of its Jurisdictional Statement have no relevance here, for the issue is not one of the applicability of § 2(a) of the Robinson-Patman Act but rather the reasonableness of a classification established within state mercantile license legislation applicable

alike to all merchants seekng to do business within the taxing district.

B. The Judgment Rests Upon an Adequate Non-Federal Basis.

The Supreme Court of Pennsylvania specifically observed that the sole subject of the dispute was the proper classification for mercantile tax purposes of certain sales filled through direct shipment from Appellant's suppliers to its customers. The lower state court had determined that such "mill direct" sales were brokered transactions. On appeal, the Supreme Court of Pennsylvania reversed, holding that the sales involved were retail transactions.

In the Commonwealth of Pennsylvania, the authorities are uniform in holding that a vendor is one who buys in order to sell[1], and that tripartite sales transactions, as here involved, are not at all uncommon, invariably resulting in a finding of retail sales[2].

It is respectfully submitted that the Supreme Court of Pennsylvania based its judgment expressly upon a substantial and sufficient non-federal basis, and the Su-

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1. *Brown & Zortmann Machinery Co. v. City of Pittsburgh,* 375 Pa. 250, 100 A.2d 98 (1953); *Norris Brothers v. Commonwealth,* 27 Pa. 494 (1856); *Commonwealth v. Thorne, Neale & Co.,* 264 Pa. 408, 107 A. 814 (1919).

2. *Brown & Zortmann Machinery Co. v. City of Pittsburgh,* supra, n. 1; *The Air Scale Co. v. Nock Co., Inc.,* 98 Pa. Super. 400 (1930); *Commercial Credit Company v. Girard National Bank,* 246 Pa. 88, 92 A. 44 (1914); *Commonwealth v. Banker Brothers Co.,* 38 Pa. Super. 101, aff'd, 222 U.S. 210 (1911).

preme Court of the United States should not take jurisdiction to review the judgment. *Black v. Cutter Laboratories,* 351 U.S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956), rehearing denied 353 U.S. 859, 77 S. Ct. 21, 1 L. Ed. 2d 69; *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2d 439 (1965).

CONCLUSION

We respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, that the appeal does not present a substantial federal question, and that the judgment rests upon an adequate non-federal basis. Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Pennsylvania.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

WILLIAMS & CO., INC. *v.* CITY OF PITTSBURGH ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 706. Decided January 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.